No. 10-80

IN THE

Supreme Court of the United States

In re ASSICURAZIONI GENERALI, S.P.A.,
DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZONI GENERALI, S.P.A. and
BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court held that a California statute requiring disclosure of Holocaust-era insurance policies was preempted by an executive agreement. Respondent, Assicurazioni Generali, S.p.A. [hereafter, "Generali"] opposes certiorari on the ground that the lower courts in this case "simply applied *Garamendi*." Brief in Opposition at i.

But the Second Circuit went far beyond *Garamendi* in concluding that decision resolved the very different circumstances of this case. First, the issue in *Garamendi* was whether a state statute, California's Holocaust Victim Insurance Relief Act ("HVIRA"), was preempted by federal law. Here, Petitioner's claims arise under long-standing state common law causes of action. Second, in *Garamendi*, there was an executive agreement negotiated between the United States and Germany. In this case, there is no executive agreement, and no opposition to the suit by the Italian government. Preemption is based solely on a letter from the United States Department of Justice asserting that lawsuits against Generali conflict with United States foreign policy. Finally, the claimants in *Garamendi* had recourse to the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). Here, ICHEIC is no longer available because it had a December 31, 2003 deadline for accepting claims.

In *Garamendi*, this Court emphasized all of these factors in concluding that the California statute was preempted. Generali opposes certiorari by asserting

that none of these three differences matters at all. But whether these distinctions matter is precisely the issue presented in the certiorari petition and what this Court needs to decide: Whether common law state claims are preempted by federal foreign policy interests where no executive agreement exists and where Petitioner has no other recourse.

Indeed, as explained in the petition for certiorari and by the *amici* urging the grant of certiorari, lower courts, in an array of different contexts, are split over whether the distinction between common law claims and statutory claims matters for the purposes of preemption, and whether preemption based on foreign policy interests can be found in the absence of an executive agreement. This case provides an ideal vehicle for this Court to address these unresolved issues of national importance presented in the wake of *Garamendi*.

Generali tries to minimize the importance of this case by trivializing the size of the claim and the number of claimants.[1] Its assertions in this regard have no basis in the record. For example, without citation, Generali

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1. There is also an oddly *ad hominem* tone to much of Generali's Brief in Opposition as it attacks co-counsel for the Petitioner (*id.* at 8), Petitioner himself (*id.* at 1), counsel for the *Amici Curiae* Professors of Constitutional Law and Foreign Relations Law) (*id.* at 21), and even members of the California State Senate and the United States Congress who filed separate amicus briefs urging certiorari. (*id.* at 20, 21). Although it is tempting to respond and set the record straight, the important point is that none of these attacks in any way deny the fact that the Second Circuit substantially extended this Court's decision

(Cont'd)

asserts that "Petitioner's case concerns a 1936 Czech insurance policy issued in local currency worth some $165 at pre-war exchange rates and valued at approximately $5,800 under ICHEIC's claimant-friendly methodology." Brief in Opposition at 1. But the Complaint alleges quite different facts and these allegations must be taken as true since this appeal arises from the granting of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Complaint states in Paragraphs 31 and 32:

> 31. In 1937, Joseph Schreiber (Generali's local agent) sold Pavel Weiss at least one life and annuity insurance policy from Generali . . . . On information and belief, Pavel Weiss also purchased property, casualty, and fire insurance policies from Generali.
>
> 32. The life/annuity policy Pavel Weiss purchased from Generali was linked to the American dollar ("New York Dollar Check") and to Gold. At the time of the purchase, the policy was worth Fifty Thousand U.S. dollars ($50,0000). Pavel Weiss fully prepaid the premium in full at the time of purchase.

(Cont'd)
in *Garamendi* and that its decision raises important, unresolved issues. The *amicus* briefs, by members of Congress, by members of the California State Senate, and by leading law professors, powerfully demonstrate that this case raises crucial issues of national importance concerning when federal executive policy preempts state law.

In addition, Paragraphs 33-39 of the Complaint describe by name other relatives of Petitioner Weiss who "on information and belief" were insured by Generali, including his father's first wife, his three children, and his six brothers and sisters. All of these individuals were killed in the Holocaust.

Generali ignores the Complaint and plaintiff's allegations of many possible insurance claims against Generali worth potentially a very large sum of money. It is inappropriate for Generali to substitute its view of the facts, without citation, and before there has been the chance for discovery or fact-finding.

Nor is it correct that Petitioner is the only person with possible claims against Generali for its unpaid insurance policies to heirs of victims of the Holocaust. As Generali admits, about 200 claimants opted out of the class action suit against it. Brief in Opposition at 8. These individuals potentially could bring claims if this Court grants certiorari and reverses the Second Circuit.[2]

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2. Generali asserts that of those who opted out "most ... are citizens of foreign countries or have not even claimed that they or their families ever purchased a Generali policy." Brief in Opposition at 8. There is nothing in the record about the citizenship of these individuals; nor would it matter in terms of their ability to sue Generali. These individuals were part of the class action against Generali because they had potential claims against it for unpaid insurance policies. These claimants included several survivors and heirs with well-documented claims against Generali. *See, e.g.*, Yisroel Schulman, *Holocaust Era Claims: Mission Not Accomplished*, New York Jewish Week, May 4, 2007.

But whether there are 20 or 200 other claimants, the important issue remains as to whether their common law claims can be preempted based on a letter from the Department of Justice asserting a foreign policy interest in the absence of an executive agreement and when no other forum exists to provide a remedy. The Second Circuit significantly extended the reach of *Garamendi* and this Court should grant review to resolve a conflict among the lower courts and decide whether there is preemption in these circumstances.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO THE PLAINTIFFS.

A. Does *Garamendi* Preempt State Common Law Claims?

This Court's decision in *Garamendi* addressed whether federal law preempted a California statute which required insurance companies doing business in California to disclose their Holocaust-era policies. The Court explained that "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." 539 U.S. at 423. This Court stressed that

this was an attempt by California to act in a matter not traditionally the focus of state regulation and to do so with "an iron fist." *Id.* at 425, 427.

This case, though, does not involve a state statutory scheme meant specifically to achieve foreign policy objectives. In this case, the issue is whether the Petitioner's common law claims are preempted. Unlike the statute adopted by California, the common law claims here were not created to regulate matters of foreign policy. The state has a much greater interest in vindicating its long-standing common law. In fact, in *Garamendi*, this Court distinguished the preempted California statute from "a generally applicable 'blue sky law.'" 539 U.S. at 425-26. This case presents the kind of generally applicable, facially neutral law expressly not considered in *Garamendi*.

The Second Circuit, however, rejected this distinction and found preemption of the common law claims. By contrast, other courts have found that *Garamendi* is limited to preempting state statutes. *See, e.g., Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005); I*n re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7 (E.D.N.Y. 2005). While Respondent is correct that these cases did not address "Holocaust-era claims of any nature, let alone Holocaust-era insurance claims" (Brief in Opposition at 17), the courts did come to the opposite conclusion from the Second Circuit as to the underlying issue of whether *Garamendi* applies differently to common law claims as compared to statutes.

Generali argues that the distinction between preemption of state common law and preemption of state statutes is irrelevant because "as regards U.S. foreign relations, the 'states do not exist,'" and "[n]o State can rewrite our foreign policy to conform to its own domestic policy." Brief in Opposition at 15 (quoting *United States v. Pink*, 315 U.S. 203, 233-34 (1942)). Generali says that the amici California State Senate "argues speciously that the President and the Second Circuit somehow invalidated the common law of contracts and torts." *Id.* at 21.

But Petitioner and its *amici* take no issue with the view that foreign policy, duly established by the federal government through a statute, treaty, or executive agreement, supersedes conflicting state law. There is nothing specious, however, in challenging the Second Circuit's contention that generally applicable state laws are entitled to no deference, and that preemption can be found merely upon the assertion of an administrative official that the state law may inconvenience a present or future executive branch policy. *Garamendi* is not authority for that result. State legislatures and the federal courts would benefit from this Court's clarification as to when state common law claims are preempted by assertions of federal foreign policy interests.

B. Does *Garamendi* Apply in the Absence of an Executive Agreement?

In finding preemption in *Garamendi*, this Court was explicit in emphasizing that there was an executive agreement between the United States and foreign

nations. Justice Souter, writing for the Court, began his legal analysis by stating: "The principal argument for preemption made by petitioners and the United States as amicus curiae is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France." *Garamendi*, 539 U.S. at 413. The Court emphasized the authority of the President "to make executive agreements with other countries," *id.* at 415, and after several pages of reviewing the history of such agreements, it concluded that executive agreements, like treaties, generally preempt state law. *Id.* at 416-17. This Court found that "[a]s for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria" provided a basis for preemption of California's statute. *Id.* at 421.

In this case, by contrast, there is no executive agreement between the United States and Italy. Generali argues that "the absence of an executive agreement between the United States and Italy is immaterial; *Garamendi* is based on conflict with presidential foreign policy, not executive agreements." Brief in Opposition at 22. But contrary to Generali's assertion, it does not follow "*a fortiori*" (*id.* at 17) that because there is preemption when there is an executive agreement, there also is preemption any time an Executive Branch official asserts a foreign policy interest. An executive agreement is a formally adopted policy of the United States that is signed by the President of the United States. Congress, if it disagrees, may override an executive agreement by enacting a statute. In this case, though, preemption is based on a

letter from the United States Department of Justice. Whether that is sufficient to establish the foreign policy interests of the United States and whether that is sufficient to preempt state law are exactly the issues raised by this case and warranting Supreme Court review.

This is precisely the point raised in both the Brief of *Amici Curiae* of Professors of Constitutional Law and Foreign Relations and the Brief of Rep. Ileana Ros-Lehtinen and Eleven Additional Members of Congress. Each of these briefs expresses grave concerns about how the Second Circuit's approach greatly expands presidential power and the scope of preemption of state law. [3]

This Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008), strongly supports Petitioner's position and necessitates this Court's clarifying the scope of preemption under *Garamendi*. In *Medellin*, this Court held that even a "plainly compelling" presidential foreign policy could not displace an otherwise valid state law.

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3. Generali's reaction to the arguments in these *amicus* briefs is curious. It quotes a law review article disagreeing with the author of the law professors' brief, which was signed by eight other distinguished professors, but never responds to the argument presented as to how the Second Circuit significantly expanded presidential power. Brief in Opposition at 21. Generali responds to the *amicus* brief by 12 members of Congress by saying that the named *amicus* has tried unsuccessfully to enact legislation to deal with the issue. *Id.* at 20. But this does not answer *amici's* basic point: allowing preemption on the basis of a letter from the Department of Justice dangerously expands executive power.

Id. at 524. The Court expressly rejected the claim that the President had the unilateral power to preempt Texas law in order to enforce a non-self-executing treaty.

Yet, in this case, the Second Circuit found preemption based on a letter from an official in the Department of Justice. This cannot be reconciled with *Medellin*. Nor can it be reconciled with this Court's earlier decision in *Barclay's Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328-29 (1994), which concluded that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned [laws]."

Generali says that *Medellin* is distinguishable from this case because here there is a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned."[4] Brief in Opposition at 27. But this is far from an accurate description of the executive position as it relates to claims against Generali. In 2000 and 2001, Generali sought a statement of interest from the Clinton Administration asserting that United States foreign policy interests favored dismissal. The Clinton Administration refused to accede to Generali's repeated

4. Generali argues that Congress's failure to act provides implicit approval of the presidential policy to make ICHEIC the exclusive remedy. Brief in Opposition at 19. This would be a stunning expansion in executive power as state laws would be deemed preempted whenever a mid-level Executive Branch officials asserts a foreign policy interest unless Congress passes corrective legislation. Congress's failure to act in these circumstances is not a basis for inferring approval.

requests because there was no executive agreement with Italy. Respondent Generali points to no instance in which the Executive Branch sought dismissal of claims against Italian insurance companies except in this case in response to requests from the Second Circuit. That is hardly a "systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned."

Not surprisingly, confusion has developed in the lower courts as to whether an executive agreement is needed to preempt state claims. *Compare Movesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009) (no executive agreement needed for preemption); *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160, 1179 (E.D. Cal. 2006) (same); with *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005); *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10 (D.D.C. 2005) (executive agreement or treaty needed for preemption). Generali does not, and cannot, deny this conflict, which warrants clarification by this Court.

C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possible Relief?

In *Garamendi*, this Court implied that, in light of the executive agreement, the appropriate forum for plaintiffs to raise their claim was the International Commission on Holocaust Era Insurance Claims (ICHEIC). The Second Circuit, based on *Garamendi*, concluded that federal law mandated that claims against Generali be brought in the ICHEIC. But there is a key difference: ICHEIC is no longer available to hear claims. It had a December 31, 2003 deadline for accepting claims.

Even when it did exist, the ICHEIC provided only very limited relief and only for a small percentage of claimants. Ironically, the four dissenting justices in *Garamendi* made this point by looking at claims against Generali. Justice Ginsburg, in a dissent joined by Justices Stevens, Scalia, and Thomas, observed: "At least until very recently, however, ICHEIC's progress has been slow and insecure. . . . Initially, ICHEIC's insurance company members represented little more than one-third of the Holocaust-era insurance market. . . . [I]t remains unclear whether ICHEIC does now or will ever encompass all relevant insurers. Moreover, ICHEIC has thus far settled only a tiny proportion of the claims it has received. Evidence submitted in a series of class actions filed against Italian insurer Generali indicated that by November 2001, ICHEIC had resolved only 797 of 77,000 claims. The latest reports show only modest increases." 539 U.S. at 432-33 (Ginsburg., J., dissenting).

Generali says that Petitioner has a remedy: he could apply directly to Generali or to the New York Holocaust Claims Processing Office. Brief in Opposition at 28. But this litigation is occurring precisely because of Generali's consistent refusal to pay on its Holocaust-era policies and Respondent offers not a shred of evidence that the New York Holocaust Claims Processing Office can provide plaintiff with any form of meaningful relief.

CONCLUSION

Respondent's argument against certiorari is that the Second Circuit's decision followed "*a fortiori*" from *Garamendi*. Brief in Opposition at 17. But that is not right because unlike *Garamendi* this case involves no state statute, there is no executive agreement, and there is no forum available for recourse. This Court should grant review to clarify the important issue of whether preemption exists in such circumstances.

Respectfully submitted,

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